

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NEW MEXICO CATTLE GROWERS)
ASSOCIATION, *et al.*,)
)
Plaintiffs,)
v.)
)
U.S. FOREST SERVICE, *et al.*,)
)
Federal Defendants.)
_____)

Case No. 1:23-cv-00150-JB-GBW

DECLARATION OF KEITH P. WEHNER

I, Keith P. Wehner, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me from official records reasonably relied upon by me in the course of my employment, hereby declare as follows:

I. Background

1. I am employed by Wildlife Services, an agency within the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (“APHIS”). I currently serve as APHIS Wildlife Services’ Western Region Director. I have held this position since September 2020. My responsibilities include providing leadership and guidance to nineteen states and the territory of Guam that comprise APHIS Wildlife Services’ Western Region, including New Mexico.

2. Prior to my current position, I worked for APHIS Wildlife Services in the following other roles:

- a. 2018-2020 – Wildlife Services Assistant Regional Director, Colorado
 - b. 2015-2018 – Wildlife Services State Director, North Carolina
 - c. 2010-2015 – Wildlife Services Assistant State Director, Tennessee/Kentucky
 - d. 2007-2010 – Wildlife Services Rabies Management Field Coordinator, Tennessee
 - e. 2003-2007 – Wildlife Services Wildlife Biologist, Tennessee
 - f. 2000-2003 – Wildlife Services Wildlife Specialist, Tennessee
3. I received a bachelor's degree in Biology/Ecology from Michigan Technological University in 1996.

II. APHIS Wildlife Services' Authorities and Mission

4. APHIS Wildlife Services' mission is to provide Federal leadership in managing conflicts with wildlife. APHIS Wildlife Services recognizes that wildlife is an important public resource valued by the American people. However, wildlife is also a highly dynamic and mobile resource that can cause damage to agriculture and property, pose risks to human health and safety, and affect natural resources.

5. APHIS Wildlife Services assists in managing conflicts with wildlife pursuant to the authority delegated to it under various Acts of Congress, including the Acts of March 2, 1931, 46 Stat. 1468-69, 7 U.S.C. §§ 8351-8352, as amended, and December 22, 1987, Public Law No. 100-202, § 101(k), 101 Stat. 1329-331, 7 U.S.C. § 8353. Those enabling Acts authorize APHIS Wildlife Services to conduct operations and assist others in managing conflicts with "injurious animal species" as well as "nuisance mammals and birds," and to take actions necessary to reduce wildlife conflicts. 7 U.S.C. §§ 8351-8353.

6. APHIS Wildlife Services does not initiate these activities on its own; it provides assistance with wildlife conflicts upon request. The actual requestor may be a public or private

entity, and may include federal and state agencies, tribes, local jurisdictions, public and private agencies, organizations, and institutions or individuals. In New Mexico, APHIS Wildlife Services works collaboratively with state and federal natural resource and land management agencies and with local governments to meet this important mission.

7. APHIS Wildlife Services can provide research assistance, technical assistance, and/or direct control assistance. *See* WS Directive 2.101 Selecting Wildlife Damage Management Methods at 2. APHIS Wildlife Services applies an integrated wildlife damage management approach to reduce or prevent wildlife damage. *See* WS Directive 2.105, The WS Integrated Wildlife Damage Management Program. Under this integrated approach, selecting methods involves consideration of the specific biologic, sociocultural, economic, physical, and other environmental circumstances associated with a given wildlife species and wildlife damage problems, as well as legal and administrative factors. *See id.*

III. APHIS Wildlife Services' Expertise in Aerial Operations for Feral Livestock Damage Management

8. Over the years, APHIS Wildlife Services has received numerous requests for assistance with damage caused by feral livestock (including cattle, goats, swine, and horses).

9. All APHIS Wildlife Services personnel involved in feral cattle damage management in New Mexico are highly trained in identification of wildlife and feral animals, the damage that they cause, and the best management practices to mitigate that damage. They are also trained and have significant experience in the safe and efficient use of firearms both from the ground and from aircraft. All such APHIS Wildlife Services personnel additionally have successfully met APHIS firearm safety standards and received official National Rifle Association Certifications. Pilots and aircraft are certified under established APHIS Wildlife Services program procedures. Only properly trained APHIS Wildlife Services program

employees are approved as crewmembers. APHIS Wildlife Services has completed Formal Risk Assessments for the Use of Aircraft in Wildlife Damage Management and for the Use of Firearms in Wildlife Damage Management. For the Gila Wilderness Project, APHIS Wildlife Services selected its most qualified aerial gunner, who currently lives in Montana. This individual developed the APHIS Wildlife Services aerial rifle protocol and training program in 2014. He is the aerial rifle instructor for the Program and has logged more than 2,000 hours of aerial gunning experience and approximately 1,000 hours of aerial rifle experience (compared to an average of 50 hours of rifle experience).

IV. APHIS Wildlife Services' Collaboration with Forest Service

10. The land at issue in this matter is the Gila Wilderness Area, located on the Gila National Forest in southwest New Mexico. The Gila Wilderness Area is 559,688 acres, and it contains the West Fork, Middle Fork, and much of the East Fork of the Gila River. The terrain is rugged, with riverside elevations around 4,850 feet, which are the lowest in the wilderness. The highest peaks in the Mongolian Mountains, which run through the wilderness, contain several summits more than 10,000 ft high.

11. The Forest Service has proposed to conduct feral cattle mitigation efforts to manage damage caused by feral cattle to riparian areas. These feral cattle cause damage through over-grazing, streambank erosion and water quality degradation, and damage to habitat for federally listed species (including narrow-headed garter snake and the Gila trout). These feral cattle also pose a threat to the public that recreate in the wilderness, and they have been known to charge hikers.

12. In the summer of 2020, the Forest Service initially contacted APHIS Wildlife Services to explore the possibility of Wildlife Services conducting feral cattle damage

management activities in the Gila Wilderness and to assist the Forest Service with removing feral cattle causing damage to riparian areas.

V. Status of APHIS Wildlife Services' Work in the Gila Wilderness Area

13. On September 15, 2020, the Forest Service entered into an Interagency Agreement (“Agreement”) with APHIS Wildlife Services. Under the Agreement, APHIS Wildlife Services conducted aerial shooting via helicopter to lethally remove 65 feral cattle in the Gila Wilderness on February 10 and 11, 2022. During these operations, our personnel did not identify any branded, tagged, or otherwise marked livestock among the feral cattle targeted and, following ground inspections of the deceased animals, there were no reports of any marked or owned livestock having been killed or injured.

14. APHIS Wildlife Services did not shoot any animals in the river during operations conducted in February of 2022. Personnel did engage with the largest feral cows (all bulls) in the river bottoms. Once personnel begin to target an animal, personnel continue to shoot until the animal is confirmed dead. Bulls are large and take multiple shots to kill, in addition, they will frequently run directly toward the water when first shot. Personnel used the helicopter to keep many bulls from entering the river using aerial herding techniques, but two bulls did enter the water despite APHIS’ best efforts to keep them from doing so. Both bulls died in the water when their momentum propelled them into the river. APHIS Wildlife Services personnel did not shoot these animals in the river.

15. In February 2022, APHIS Wildlife Services personnel conducted aerial surveillance of the operation area prior to any shooting, and reported seeing an already-dead cow near the river prior to the first shot being fired.

16. On February 13, 2023, the Forest Service entered into a second Agreement with

APHIS Wildlife Services. Under the Agreement, APHIS Wildlife Services will conduct aerial shooting via helicopter to remove additional feral cattle. The Forest Service estimates that there remain 50-150 head of feral cattle causing damage to riparian areas. All of APHIS Wildlife Services' activities will be coordinated with the Forest Service.

17. In collaboration with the Forest Service and consistent with APHIS Wildlife Services policy, it was decided that the methods and techniques APHIS Wildlife Services will use include aerial shooting with suppressed firearms and non-toxic (copper) bullets. APHIS Wildlife Services will use one Bell Jet Ranger helicopter, which is limited to flyovers only. The helicopter will not land in the Wilderness Area.

18. On February 16, 2023, APHIS Wildlife Services determined that the activities pursuant to the Agreement are categorically excluded from further NEPA analysis and do not require the preparation of an Environmental Assessment or Environmental Impact Statement. See Exhibit 1, attached.

19. Starting on Thursday, February 23, 2023, APHIS Wildlife Services will commence dispatching the remaining feral cattle. The pilot and crew will leave the area after concluding operations on Sunday, February 26, 2023.

20. APHIS will take every measure to ensure that calves are not orphaned. During removal operations, APHIS Wildlife Services will remove all feral cattle found within an area designated by the U.S. Forest Service. Whenever calves and cows are observed, both animals will be lethally removed. The calf will be removed first.

21. APHIS will take every measure to ensure that cattle do not die in the water. APHIS will not dispatch cattle close to the river. Cattle removal will instead be focused on the higher elevation areas where it is most difficult to gather cattle from the ground and also far

away from riverways.

22. APHIS will take every measure to ensure that cattle are quickly and humanely dispatched. Aerial operations provide a distinct advantage over ground removal efforts in this respect. Wounded animals shot from the ground can easily outrun and hide from shooters after the first shot. Wounded animals can easily cover multiple miles before they eventually succumb to their wounds or worse yet, live for some time if a wound is not fatal. Lethal removal using aerial operations eliminates an animal's ability to outrun a shooter or escape in a wounded state. Once APHIS Wildlife Services engages with a particular animal, personnel will continue to shoot until the individual animal completely stops moving and is confirmed dead. This method ensures that cattle do not escape in a wounded state.

23. Shooting cattle or similar sized animals, like elk, from the ground is much less effective than aerial operations, creates significantly more issues with humaneness, and results in large numbers of animals that escape to suffer and ultimately recover, or eventually succumb to their wounds. Research on wounding rates for elk are readily available from multiple sources. Wounding rates are generally reported as a percentage of animals wounded in relation to the percentage of animals killed and recovered. Wounding rates for elk are generally reported between 5 and 10% during rifle hunts, although research is somewhat limited on this species due to difficulties in studying these animals across the large landscapes in which they are found. Wounding rates for bowhunting are significantly higher, one report from Montana in 1989 reported that bowhunters killed and recovered 850 elk and wounded but didn't retrieve an additional 885 elk, a 104% wounding rate. A more easily studied species and more frequently published wounding rates can be found with white-tailed deer on limited access areas like Department of Defense facilities. In these studies, wounding rates ranged from 7% (rifle) to 62%

(bowhunting) with most estimates nearing the 50% rate for ground hunting. Thus, APHIS Wildlife Services' commitment to use aerial dispatch methods to ensure no cattle escape in a wounded state is preferable to and more humane than ground shooting.

24. Upon confirmation of death, APHIS Wildlife Services staff will collect geospatial coordinates for all feral cattle lethally removed.

25. If APHIS Wildlife Services is unable to complete operations by end of day, Sunday, February 26, multiple funding challenges will limit its ability to resume operations later this year. All funding available from the Forest Service provided through the Agreement will likely have been exhausted. Forest Service and APHIS Wildlife Services would need to draft, fund, and execute an entirely new Interagency Agreement.

26. The funding challenges are compounded by logistical challenges that prevent APHIS Wildlife Services from delaying lethal operations into March. APHIS Wildlife Services flew in a wildlife specialist from Montana with unique expertise to ensure the success of this project. If operations are halted this week, our staff would go home to Montana. The current Agreement does not provide enough funding to reposition the crew member or the pilot and helicopter back to the Gila this month. The Agreement provides funding for 29 hours of flight time including ferry time to and from personnel duty stations. Personnel are already en route to the base of operation, and if operations are not allowed to proceed it would cost the U.S. Forest Service at least \$15,000 to simply send them home.

27. For a variety of reasons, APHIS Wildlife Services is generally limited to conducting these particular operations in the month of February. First, people are least likely to be in the Gila Wilderness during February. Hunting seasons end in January, and recreational use of the Gila is at its absolute lowest levels during the month of February. Second, trees and brush

have lost their leaves so the canopy cover is at its lowest in February, making it the most cost-effective and efficient time to conduct aerial work. Although leaves drop in late fall, the hunting season begins in early August and doesn't end until January 31, increasing recreational use of these areas during these fall and winter months. Finally, the endangered Mexican Spotted Owl begins nesting sometime in March, and there are a small number of known nesting sites in the wilderness. Any aerial operations in areas of Mexican Spotted Owl nesting needs to be completed before mid-March. APHIS Wildlife Services decided to complete operations prior to March 1 to ensure the most conservative deadline to avoid impacts on the Mexican Spotted Owl.

28. If APHIS Wildlife Services is unable to complete aerial operations under the Agreement in February of 2023, the next window for it to conduct operations would be February of 2024.

29. APHIS Wildlife Services lethally removes other injurious wildlife and feral animals to support ranchers in New Mexico. During fiscal years 2017 – 2021, APHIS lethally removed 2,624 coyotes, 607 feral swine, one bobcat, and three Mexican wolves from aircraft – the same way that feral cattle were removed in 2022 and are planned for 2023. APHIS Wildlife Services has been conducting lethal removal of injurious wildlife and feral animals in New Mexico since at least 1989 with the full support of New Mexico ranchers. APHIS Wildlife Services received letters of support from the NM Department of Agriculture in 2015 and the NM Cooperative Feral Hog Eradication Team (NMCFET) in 2013 as official comments to the Wildlife Services Feral Swine EIS (attached as Exhibit 2). This EIS proposed, and the Record of Decision (attached as Exhibit 3) ultimately selected, an alternative to eradicate feral swine in part through aerial gunning. One of the Plaintiffs, the New Mexico Cattlegrowers Association, is a member of the NMCFET and supported the aerial gunning of feral animals as part of that action.

30. I hereby certify that the documents attached to this declaration are true and correct copies of official APHIS Wildlife Service records kept in the ordinary course of business.

31. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Executed this 21st day of February 2023, at Fort Collins, Colorado.



Keith P. Wehner
Western Regional Director
APHIS -Wildlife Services